UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of:

METROPOLITAN REGIONAL COUNCIL OF CARPENTERS SOUTHEASTERN PENNSYLVANIA, STATE OF DELAWARE, AND EASTERN SHORE OF MARYLAND, AND ITS AFFILIATED LOCAL, CARPENTERS UNION LOCAL 2012

Respondents,

and

FORCINE CONCRETE & CONSTRUCTION CO., INC.

Charging Party.

Case No.: 4-CB-10520

BRIEF IN SUPPORT OF CHARGING PARTY'S EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE DECISION

COHEN SEGLIAS PALLAS GREENHALL & FURMAN, PC

Marc Furman, Esquire
Email: mfurman@cohenseglias.com
Melissa C. Angeline, Esquire
Email: mangeline@cohenseglias.com
30 South 17th Street, 19th Floor
Philadelphia, PA 19103
(215) 564-1700
(215) 564-3066 (fax)
Attorneys for Charging Party,
Forcine Concrete & Construction Co., Inc.

I. INTRODUCTION

Charging Party, Forcine Concrete & Construction Co., Inc. ("Forcine"), submits this brief in support of its exceptions to the Decision issued by Administrative Law Judge Arthur J. Amchan ("ALJ"), dismissing a complaint alleging violations of Section 8(b)(1)(A) of the National Labor Relations Act (the "Act") by Respondents, Metropolitan Regional Council of Carpenters, Southeastern Pennsylvania, State of Delaware and Eastern Shore of Maryland (the "Union") and its affiliated local, Carpenters Union Local 2012 ("Local 2012").

II. STATEMENT OF THE CASE

A. ALJ Decision

On March 28, 2011, the ALJ held a full and complete hearing in the above-captioned matter in Philadelphia, Pennsylvania, and issued his Decision on May 18, 2011 (JD-30-11). The facts in this case are largely undisputed; the parties submitted a joint stipulation of facts and legal issues (Ex. J-1), the Union's videotape of its conduct (Ex. J-2), and the edited video posted to YouTube and Facebook by the Union and Local 2012 (Ex. J-3).

In this case, the General Counsel alleged that the Union and Local 2012 violated Section 8(b)(1)(A) of the Act by restraining and coercing Forcine's employees and other employees from exercising their Section 7 rights to refrain from engaging in union or other concerted activities. On June 4, 2010, four Union agents entered an active, fenced-off construction site without authorization and went to a partially-constructed building where Forcine was performing work as a subcontractor. The Union agents went through the project site, climbed a ladder to the second floor deck, gathered Forcine's Hispanic employees, stopped them from working, and interrogated them in front of a video camera about immigration and employment issues. Throughout their visit, the Union agents behaved in an intimidating, threatening and coercive manner, and portrayed themselves as government officials conducting an official investigation of

immigration violations. Soon after, the Union submitted a copy of the videotaped interrogations to the NLRB as "evidence" supporting its own salting campaign and unfair labor practice charge alleging that Forcine, a non-union employer, was refusing to hire Union members due to their union affiliation. (*See* Ex. J-2.) The Union and Local 2012 also posted an edited video of the interrogations with editorial comments on the Internet (the "YouTube Video"). (*See* Ex. J-3.)

The General Counsel alleged that the Union's interrogation and videotaping of Forcine's employees violated their Section 7 rights to refrain from engaging in union or other concerted activities. The General Counsel also alleged that the Union violated Section 8(b)(1)(A) by posting the YouTube Video containing excerpts of the employee interrogations and editorial commentary against Forcine on YouTube, and that Local 2012 similarly violated Section 8(b)(1)(A) by linking the YouTube Video to its Facebook page.

In his Decision, the ALJ held that the Union's conduct on June 4, 2010 did not violate Section 8(b)(1)(A) of the Act, even though the ALJ found that the Union agents "coerced and restrained" Forcine's employees by interrogating them in a "very intimidating manner," bullying the employees, and preventing them from working. (Decision at p. 3, Il. 16-19, and p. 4, Il.10-12.) According to the ALJ, however, "Section 7 is not so broad as to protect simply working in situations in which the employee is not confronted with a choice between engaging in protected activity or not" (Decision at p. 4, Il. 21-23), and the Union agents, who refused to identify themselves or their union affiliation, did not confront Forcine's employees with that "choice" (Decision at p. 3, Il. 13-14). The ALJ cited no case for this additional "choice" requirement, and there is no legal support for this proposition.

The ALJ likewise refused to hold that the Union's posting of the YouTube Video on the Internet, and Local 2012's linking the Union's YouTube Video to its Facebook page violated

Section 8(b)(1)(A), based on his earlier, unsupported decision that employees must be "confronted with a choice" in order to be coerced and restrained from engaging in Section 7 activity, (Decision at p. 5, Il. 19-36.)

Forcine excepts to the ALJ's Decision as contrary to Board law and basic principles underlying Sections 7 and 8(b)(1)(A) of the Act.

B. Factual Background

Given that all parties agreed in their Post-Hearing Briefs that the facts are generally undisputed, Forcine does not wish to burden the Board by repeating the lengthy factual background set forth in its Post-Hearing Brief or the parties' Joint Stipulation of Facts and Issues. Instead, Forcine refers the Board to pages 4 through 18 of its Post-Hearing Brief, and the parties' Joint Stipulation of Facts and Issues (Ex. J-1), which are incorporated by reference as if fully set forth herein, and provides the following summary of the ALJ's factual findings and certain record evidence.¹

In September 2009, the Union began conducting a salting campaign against Forcine, a non-union concrete construction company, in order to place some of its members, including its council representatives/business agents and union organizers, with Forcine. (Decision at p. 2, ll. 26-28.) The Union also filed an unfair labor practice charge against Forcine, alleging that Forcine did not hire its members due to their union affiliation. The charge was later settled before the ALJ's hearing in the instant matter. (Decision at p. 2, ll. 29-31.)

On June 4, 2010, Union agents Robert Burns, Michael Griffin, Richard Rivera, and William Dyken walked uninvited, without permission, onto a private closed construction site

3

¹ Citations to the ALJ's Decision issued on May 18, 2011 are referenced as "Decision at __." Citations to the Post-Hearing Brief are referenced as "Forcine Brief at __."; the Hearing Transcript is referenced as "Tr. at ___."; joint exhibits are referenced as "Ex. J-__."; and the General Counsel's exhibits are referenced as "Ex. GC-__."

("Rydal Park").² (Decision at p. 2, ll. 33-35, 45.) Rivera, who speaks Spanish fluently, videotaped the event and served as the narrator and translator, while Dyken served as the chief spokesperson. (Decision at p. 2, l. 48.) The Union agents walked through the site and climbed a ladder to the second floor of a partially-constructed building where 12 to 14 Forcine employees were preparing rebar tension fittings for a concrete pour. (Decision at p. 2, ll. 37-38.) The Union agents did not identify themselves or mention the Union. They wore "uniforms" consisting of matching blue polo shirts, khaki pants, and white hardhats, and purposefully concealed their true identity and union affiliation. (Decision at p. 2, ll. 40-42, and p. 3, ll. 5-6, 13-15.)

The Union agents announced that they were investigating reports of illegal immigrants on the site, gathered Forcine's Hispanic employees, and interrogated the employees about various immigration and employment issues, including how long they had worked for Forcine, how they were hired, and how much they were paid. (Decision at p. 2, ll. 48-52.) The ALJ summarized the Union agents' conduct during the interrogation as follows:

[T]he questioning was done in a very intimidating manner. The Union agents bullied the employees they interrogated. It is also apparent that the four union representatives prevented the Forcine employees from working while they were questioning them. . . . these employees were not on break and were not working during their interrogations because the MRC agents interfered with their work activities. . . . Dyken at one point told Forcine employees that he and the other 'inspectors' would leave the second floor deck and return in a half-hour. Dyken told them that he wanted to see documentation of their immigration status at that time. This would have required some employees to stop working and leave the second floor on which they were working to obtain such papers, if they had them.

(Decision at p. 3, ll. 16-19, 23-25, 30-34) (emphasis added.)

While the ALJ's description, above, provides an overview of the Union agents' conduct on June 4, 2010, it does not provide the full flavor of their egregious and unlawful actions. For

² Forcine was working as a subcontractor at Rydal Park, and Whiting-Turner was the general contractor at Rydal Park. (Decision at 2, 37-38.)

example, the Union agents repeatedly prevented the employees from walking away through physical and verbal intimidation, including shouting at them, "Come here, fellas. Come here. We don't want anybody to walk away," and "Whoa, whoa, wait here. I'm going to need you as a witness as well." (Ex. J-2 at 03:20-03:23, 10:40-10:42.) In the latter example, Dyken demanded that the employee write down his name and address, which he did while being videotaped. (Ex. J-2 at 12:10-12:26.) The Union also refused an employee's attempt to get the boss, as Dyken told him: "We want to ask you guys. We don't need your boss." (Ex. J-2 at 03:00-03:05.)

The Union agents' interrogations of Forcine's employees, while videotaping them, became increasingly aggressive, derogatory and threatening:

- o "Who are you employed by?" (Ex. J-2 at 02:53-02:55)
- o "What is your name?" (Ex. J-2 at 03:37-03:38, 03:47-03:49; 14:18-14:22.)
- o "How much do you make in an hour? I want to know how much you make an hour." (Ex. J-2 at 03:49-3:52)
- o "How do they pay you? Do they pay you cash or do they pay you check?" (Ex. J-2 at 04:06-04:08)
- o "Were you hired directly through Forcine or through a hiring agency?" (Ex. J-2 at 04:23-04:26)
- o "How did you get hired by Forcine? You call their office?" "You went to their office? Where is their office located?" (Ex. J-2 at 04:47-04:57)
- o "Where are you from? What country are you from?" "Where is your country of origin?" (Ex. J-2 at 02:13-02:16, 04:40-04:44, 14:20-14:25)
- o "Are you a citizen of the United States? . . . You're an actual citizen? You're not here on a work visa or business? You're an actual citizen of America?" (Ex. J-2 at 02:28-02:40)
- "You got paperwork? You got ID?. . So nobody has ID." (Ex. J-2 at 02:08-02:12, 06:40-06:47; Ex. J-3 at 00:44-00:57)
- o "Now you guys that are legal you're legal? You're legal in this country? You got documentation? You have documentation that you're in...hold on [garbled], we're not through." (Ex. J-2 at 06:24-06:35)

- o "How do you pay your taxes?" (Ex. J-2 at 03:13-03:15, 15:09-15:12; Ex. J-3 at 02:31-02:33)
- o "Did you make a number up? Did you make a tax number up for your application, or did Forcine give you a number to write down?" "How did [you] get the number" for taxes? Who gave you the number? Who gave it to you?" (Ex. J-2 at 09:38-09:43, 15:17-15:21, 15:35-15:48; Ex. J-3 at 01:07-01:13, 02:55-03:13)
- O Dyken and Rivera threatened the employees: "We're gonna come back in a half an hour and you better have documentation . . . We're coming back. You're gonna have your right.. . you're gonna have your paperwork, right?" (Ex. J-2 at 06:57-07:07, 07:21-07:26; Tr. at 44, ll. 23-25; 45, ll. 1-21.)
- O Just before the Union agents descended to the ground floor to interrogate other employees, they stated: "We're going to continue our investigation." (Ex. J-1, ¶9; Ex. J-2, 12:44-12:46.).

The Union agents repeatedly stated, in the employees' presence and in front of the video camera, that Forcine's employees were "undocumented workers" or "illegal workers," or that an employee had admitted to "being an illegal." (Ex. J-2, 09:23-09:25, 12:18-12:21, 14:43-15:00, 17:15-17:19; Ex. J-3 at 01:01-01:03, 02:01-02:03, 02:18-02:20.)

When Forcine's safety facilitator/crane operator, Thomas Romano,³ asked the Union agents at the outset if they were from OSHA or Whiting-Turner, they responded, "No," and stated they were conducting a "special investigation" and would meet him at the work trailer in ten minutes, in an attempt to portray themselves as government officials with legal authority to take control over and interrogate Forcine's employees without "interference" from Forcine. (Tr. at 17, Il. 4-17.) Romano's later requests for identification were also rebuffed. (Ex. J-2 at 13:22-13:31; Ex. J-1, ¶11; Ex. J-3 at 03:27-03:39; Tr. at 15, I. 25; 16, Il. 1-2, 23-25; 17, Il. 1-20.) All of this was done in front of workers of Forcine and other contractors.

The Union likewise refused the efforts of Whiting-Turner's Project Manager to obtain

6

³ There is no evidence, nor was there any representation or position taken, that Romano is anything other than a rank and file employee entitled to the same Section 7 protection as the other interrogated Forcine employees. Indeed, when Romano tried to learn the identity of the Union "investigators," he was repeatedly dismissed out of hand.

their identification. When the Project Manager asked for a business card, Dyken waved him off and stated: "No. No, I don't have a card. No business cards, man. You know what, I'm not getting interrogated here. You're not gonna interrogate me, sir." (Ex. J-2, 13:06-13:13.) When Whiting-Turner's Project Manager persisted, Burns threatened, "Don't interfere with our investigation," and added, pointing his finger at Camarella, "I'm not going to continue to tell you that." (Ex. J-2, 16:33-16:37; Tr. at 31, Il. 4-7-10.) All of this was done in front of workers of Forcine and other contractors.

The Union's unauthorized site visit and employee interrogations lasted about 20 minutes. (Decision at p. 3, 1. 5.)

Burns testified at the hearing that they interrogated Forcine's employees, and submitted their video of the employees to the NLRB, Region 4, in furtherance of the Union's salting campaign and unfair labor practice charge against Forcine in Case 4-CA-37560. (Tr. at 43.) Burns admitted in this testimony that the Union agents intentionally concealed their union affiliation, by their uniform and refusal to identify themselves, because "if we identify ourselves, we're defeating the purpose. We're not going to get any information. They won't feel comfortable talking to us." (Tr. at 33, Il. 14-17) (emphasis added.)

Burns also testified that he personally decided the Union agents would wear matching uniforms, and purchased identical navy golf shirts for each Union agent. (Tr. at 29, ll. 7-17; 30, ll. 20-22.) Burns knew other Union agents wore this "uniform" specifically for the purpose of going to construction sites and asking questions about immigration issues. (Tr. at 30, ll. 4-11.) This is the same "plain clothes" uniform worn by certain government law enforcement agents, including the U.S. Immigration and Customs Enforcement ("ICE"). (Tr. at 39, ll. 1-19; 47, ll. 16-19; 48, ll. 22-25; 49, ll. 1-4.)

Michael Tapken, a Local 2012 member and Administrative Assistant to Edward Coryell,

the Union's Executive Secretary and Treasurer, created a new video - the YouTube Video -

containing excerpts from the full video and written comments urging viewers to express their

"outrage" at Forcine to the project owner, Presbyterian Inspired Living. (Ex. J-1, ¶21; Ex. J-3.)

The YouTube Video, uploaded on July 12, 2010, resulted in a flurry of hate mail and threats of

violence against Forcine and its employees. Indeed, as of March 9, 2011, the YouTube Video

had been viewed 28,961 times and viewers had posted 211 comments (including several

comments posted by Tapken). (Decision at p. 3, Il. 40-42; see also Ex. GC-4 and Ex. J-1, ¶22.)

On July 12, 2010, John Brown (President of Local 2012 and a paid Union Business Agent)

linked the YouTube Video to Local 2012's Facebook page. (Ex. J-1, ¶23.)

The ALJ properly concluded that Forcine's employees were likely to learn about and

view the video on YouTube and/or Facebook, and that the video and the strong feelings incited

by the video would likely restrain them and other non-native Hispanic employees from

continuing employment with Forcine or working for other non-union contractors. (Decision at

p.5, ll. 19-27.)⁴

Ш. **OUESTIONS PRESENTED**

> Did the ALJ err in holding that the Union did not violate Section **Ouestion 1:**

8(b)(1)(A) of the Act by restraining and coercing Forcine's employees on June 4, 2010 from

exercising their Section 7 rights to refrain from engaging in union or other protected activity

(Exceptions 1 through 4)?

Answer: Yes.

The fact that the Internet site containing the YouTube Video identified the Union, and that Local 2012 linked the video to its own Facebook page, constitutes further evidence of the direct connection between the Union's and Local 2012's misconduct and violation of the Section 7

rights of Forcine's employees.

8

Question 2: Did the ALJ err in holding that the Union did not violate Section 8(b)(1)(A) of the Act by posting on the Internet, via YouTube, an edited video of the interrogations with allegations against Forcine, and that Local 2012 did not violate Section 8(b)(1)(A) of the Act by linking the YouTube video to its Facebook page (Exceptions 5 & 6)?

Answer: Yes.

IV. ARGUMENT

A. The ALJ Erred In Holding That The Union's Conduct On June 4, 2010 Did Not Violate Section 8(b)(1)(A) Of The Act By Restraining And Coercing Forcine's Employees From Exercising Their Section 7 Rights To Refrain From Engaging In Protected Activity

In his Decision, the ALJ correctly held that the Union agents "restrained and coerced Forcine's employees when they entered the jobsite on June 4, 2010 and interrogated them about their immigration status and other matters," and prevented the employees from working. (Decision at p. 3, l. 18, and p. 4, ll. 10-12.) The ALJ also found that the Union's conduct "could only have been calculated to discourage [the employees] from working for Forcine," and, in fact, "had a reasonable tendency to restrain them from continuing their employment with Forcine." (Decision at p. 5, ll.12-13, 15.) Under Board law, these findings are sufficient to establish that the Union violated Section 8(b)(1)(A) of the Act. See, e.g., Electrical Workers Local 98 (Tri-M Group, LLC), 350 NLRB 1104, 1105 (2007); Electrical Workers Local 98 (MCF Services), 342 NLRB 740, 752 (2004). Instead of applying Board law, however, the ALJ created his own standard with the additional requirement that employees must be "confronted with a choice

⁵ As set forth in Exception 3, Forcine takes exception to the ALJ's finding that the Union's "interrogations of Forcine's employees could only have been calculated to discourage them from working for Forcine and had a reasonable tendency to do so." (Decision at p. 5, ll. 12-13.) While Forcine agrees that the Union's conduct was intended, in part, to discourage employees from continuing to work for Forcine, Forcine disagrees that it was the Union's *only* intention. According to the Union's own stipulated facts and witness testimony, the Union also did engaged in this conduct to obtain "evidence" for submission to the NLRB in support of its salting campaign and related unfair labor practice charge, and for broader public dissemination.

between engaging in protected activity or not." (Decision at p. 4, ll. 22-23.) By imposing this additional requirement, the ALJ departed from the Board's established standard and improperly narrowed the scope of employee protection guaranteed by the Act. (*See* Exceptions 1 & 2.)

When Congress enacted Section 8(b)(1)(A) in 1947, it was most concerned about situations such as union coercion of non-union employees in the organizing and labor dispute context. *NLRB v. Teamsters Local 639 (Curtis Bros.)*, 362 U.S. 274, 286 (1960); *Randell Warehouse of Arizona (Randell II)*, 347 NLRB 591, 595 (2006) (photographing employees engaged in protected concerted activities, without proper justification, has a tendency to coerce employees in violation of the Act). Congress sought to ensure that unions engaged in organizational activities used persuasion and propaganda, instead of physical force, violence, threats or economic reprisal. *Furniture Workers Local 140 (Brooklyn Spring Corp.)*, 113 NLRB 815 (1955) (Section 8(b)(1)(A) violated when nonunion, non-striking employees refused to stop working and were pushed into cars bound for the union hall). Thus, Section 8(b)(1)(A) prohibits unions from engaging in activity that reasonably tends to restrain or coerce employees from exercising their Section 7 rights, including the right to work for the employer of their choice. (*See* Exceptions 1 & 2.)

These principles are reflected in the Board's standard for analyzing coercion claims under Section 8(b)(1)(A). In a case that also involved the Union, *Metropolitan Regional Council of Philadelphia and Vicinity, United Brotherhood of Joiners and Carpenters of America, AFL-CIO*, 335 NLRB 814, 815 (2001), the Board held that whether a union violates Section 8(b)(1)(A) "turns not on evidence that a particular employee was actually restrained or coerced by union conduct but, rather, whether such conduct would have a reasonable tendency to restrain or coerce employees in the exercise of statutory rights."

The Board has decided numerous cases involving the same scenario here – that is, union efforts to restrain non-union employees from exercising their Section 7 rights by preventing them from working. Indeed, in 3 of the 4 decisions cited by the ALJ, the Board held that the unions had violated Section 8(b)(1)(A) by preventing the employees from performing work for their non-union employers, and that the employees were engaged in Section 7 activity merely by performing work. (Decision at p. 3, Il. 25-42, and p. 4, Il. 5-10, citing *Teamsters Local 890 (Basic Vegetable Products)*, 335 NLRB 686 (2001), *Electrical Workers Local 98 (MCF Services)*, 342 NLRB 740 (2004), and *Electrical Workers Local 98 (TRI-M Group, LLC)*, 350 NLRB 1104 (2007).) (*See* Exceptions 1 & 2.)

In this case, the ALJ found that, like the employees in the above cases, Forcine's employees were engaged in the sole activity of performing work for a non-union employer, and that the Union, like the unions in those cases, prevented Forcine's employees from working for a non-union employer. (Decision at p. 3, Il. 25-42, and p. 4, Il. 5-10). Yet, the ALJ attempts to distinguish those cases by holding that the violation turned on the existence of a known labor dispute between the employer and union, and, absent a known labor dispute, the ALJ "inferred" that the employee reasonably would have "connected the dots," so to speak, with the result that those employees were "confronted with a choice" of whether to support the union. (*Id.*) Nowhere in those cases did the Board hold or suggest that a known labor dispute or knowledge of union involvement, let alone confrontation with a "choice" of whether to support the union, was necessary to find the employees were engaged in the protected Section 7 activity of working. (*See* Exceptions 1 & 2.)

In the only other case cited by the ALJ, *Electrical Workers Local 48 (Oregon-Columbia Chapter of National Electrical Contractors Ass'n)*, 342 NLRB 101 (2004), the Board held that

the union unlawfully operated its hiring hall by rewarding members who supported its salting campaigns to the detriment of members who did not. In his Decision, the ALJ held that the Electrical Workers decision "is not relevant to the situation confronting Forcine's employees," because the Electrical Workers union's conduct "clearly had the tendency" to coerce union members into supporting the union. (Decision at p. 3, Il.25-50, and p. 4, Il. 5-10.) Contrary to the ALJ's argument, the *Electrical Workers* decision is relevant here, because it shows that the Board does not limit Section 7's protection of an employee's right to work to a single type of factual scenarios, and (like the other cases) does not require that employees be "confronted with a choice" whether to support the union. In addition, the employees in the *Electrical Workers* decision, like Forcine's employees, were unwittingly thrust into the middle of the union's salting campaign against non-union employers.

Just as there is no requirement that employees be "confronted with a choice" whether to engage in union activity, there is no requirement that employees affirmatively assert a Section 7 right before they are entitled to protection. *See e.g., Teamsters Local 890 (Basic Vegetable Products)*, 335 NLRB at 687 (union's photographing or videotaping license plates or occupants of vehicles crossing picket line, combined with abusive remarks, violated the Act by reasonably tending to create fear of reprisal in minds of replacement employees); *Soft Drink Workers Local 812 (Sound Dist. Corp.)*, 307 NLRB 1267 (1992) (union violated the Act by placing nails on the road to damage cars driving into employer's facility); *Plumbers Local 250 (Murphy Bros.)*, 311 NLRB 491 (1993) (union's request that employer lay off legitimately employed union travelers violated the Act). Nowhere did the Board discuss whether those employees were "confronted with a choice" about supporting the union; in fact, those employees were not actually not required to make any such "choice" or given reason to believe that a choice was necessary.

The ALJ's "choice" requirement also fails to recognize the significance of the fact that Forcine's employees were actually prevented from making such a choice by the union itself. As set forth above, the Union agents schemed to prevent the employees from learning their union affiliation, impersonated government officials conducting an immigration raid, and threatened Forcine's safety facilitator/crane operator (an "employee" entitled to Section 7 protection) and Whiting-Turner's Project Manager in response to their repeated requests for identification, in full view and hearing of Forcine's employees. Additionally, the Union agents verbally and physically intimidated, threatened and bullied Forcine's employees to ensure they would answer the agents' questions and prevent them from leaving or returning to work. As shown by the video, they interrogated Forcine's employees with rapid-fire questioning, in English and Spanish, and angrily spoke (and in some instances, shouted and yelled) at the employees to "come back here" and "we're not through with you yet." They gathered Forcine's employees in a group, and positioned themselves in a circle around the employees to ensure that they stayed and answered questions. All of the employees appeared confused and fearful, with some biting their nails and others looking around for a way out. (See Ex. J-2.) One employee felt so intimidated that he asked permission to obtain a drink of water. (Ex. J-2, 10:25-11:25.) Each time that an employee attempted to find out who they were, the Union agents rebuked their efforts. As Burns testified, the Union agents deliberately concealed their union identity because "if we identify ourselves, we're defeating the purpose. We're not going to get any information." (Tr. at 33, ll. 14-17). In short, the Union purposely gave Forcine's employees no "choice" – even assuming, arguendo, that such a choice is required in order to find a violation. (See Exceptions 2 & 4.)

The Union's outrageous and unlawful conduct (including trespassing onto the closed construction site, impersonating government officials allegedly investigating immigration issues,

videotaping without the employees' permission, and interrogating employees under false pretense), ensured that the employees were unable to freely exercise their right **not** to assist the union. Given these circumstances, Forcine's employees were unable to choose not to answer questions designed to help the Union gain evidence to use against Forcine and help the Union with its salting campaign, unfair labor practice, and labor dispute. (*See* Exceptions 2 & 4.)

Indeed, taking the ALJ's reasoning to its absurd conclusion, a person could point an unloaded gun at someone and demand his money, but get away with the crime because the victim did not know that the gun was not loaded (and thus was not "confronted with a choice" of whether to give up his money). Likewise, the Union agents cannot conceal their identity and impersonate government officials to coerce Forcine's employees into providing information to be used in support of the Union's salting campaign, unfair labor practice charge and dispute with Forcine, and then rely on their concealment and impersonation to "shield" them against liability for their coercion. Under the ALJ's standard, the employees for whom Section 7 was designed to protect would be required to have inherent knowledge of its protections in order to assert their rights. Such a result would be unconscionable under the letter and spirit of the law.

Accordingly, the Board should reverse the ALJ's Decision, and hold that the Union violated Section 8(b)(1)(A) of the Act by coercing and restraining Forcine's employees from exercising their Section 7 rights to refrain from supporting the union.

B. The ALJ Erred In Holding That The Union Did Not Violate Section 8(b)(1)(A) Of The Act By Posting On The Internet An Edited Video Of The Employee Interrogations And Editorial Commentary

The Board similarly should reverse the ALJ's holding that the Union did not violate Section 8(b)(1)(A) of the Act when it posted the YouTube Video on the Internet. In his Decision, the ALJ, in reliance on his "confronted with a choice" requirement, held that "as with the

interrogation itself, the postings on You Tube (sic) and Facebook did not present employees with a choice of engaging in protected activity or refraining from engaging in protected activity." (Decision at p. 5, 1l. 27-29.) (*See* Exceptions 5 & 6.) As discussed above, the ALJ's "choice" requirement conflicts with Board law and is not supported by any other law.

The ALJ's factual findings establish that the Union's conduct of posting the YouTube Video was coercive and violated Forcine's employees' Section 7 right to refrain from supporting the Union. (*See* Exception 6.) The ALJ found it was reasonably likely that:

- Forcine's employees would become aware of the YouTube video in which they
 were portrayed and would visit the YouTube site, as would other non-native
 Hispanic employees.
- They would see the "strong feelings incited by [the] video and would likely be restrained or inhibited from continuing to work at Forcine jobsites or for other non-union contractors"; and
- "[T]hey would learn, if they did not already know, that it was the Union performing the interrogations on June 4."

(Decision at 5, ll. 21-27.)

In *Allegheny Ludlum Corp.*, 333 NLRB 734 (2001), the Board held that dissemination of a video conveying an employee's position in a labor dispute without the employee's consent or other safeguards, violates the employee's Section 7 rights. *See also American Postal Workers Union, Local 735 (U.S. Postal Service)*, 340 NLRB 1363, (2003); *Electrical Workers Local 501, (Samuel Langer) v. NLRB*, 181 F.2d 34, 39 (2d Cir. 1950). By posting the YouTube Video on the Internet, the Union compounded its earlier unlawful coercion of Forcine's employees on June 4, 2010, by broadcasting its conduct to the world, with the unlawful but intended consequence of inciting hate mail and threats of violence against Forcine and its employees.

Moreover, the Union did not end its coercive and unlawful conduct by simply posting the YouTube Video. As the undisputed facts show, Michael Tapken, the Union employee and Local

2012 member who created the YouTube Video, posted comments on YouTube depicting Forcine and its employees as criminals taking jobs away from "legitimate contractors," *i.e.*, union contractors. By way of example, his comments included the following:

July 15, 2010

Answer to your question what is wrong with the illegals. Nothing they are only men trying to feed their families. The companies that exploit them avoid payroll taxes, insurances and une[m]ployment. They work long days with no overtime. They are usually classified as 1099's which mean thet (sic) have no workmans (sic) comp and if they get hurt on the job site the health care is paid by real tax payers. All this why legitimate contractors lose the projects because they lay (sic) by the rules when others donot (sic).

July 19, 2010

@kimmradd – I agree but the employers are the ones exploiting the workers. So you are right they are here taking jobs from American workers but the employers are doing it solely to buy a bigger car or a better shore house. The workers are doing it to feed their families. If the employers were penalized you wouldn't have to deport them they would just leave.

Late July, 2010

@bigpops215 the date is on the title and the job is going on with 40-60 workers (Ex. GC-4 at 2, 9, 10) (emphasis added).

Given these undisputed facts and the ALJ's findings, the Union's posting of the YouTube Video on the Internet was intended, and had a reasonable tendency, to restrain Forcine's employees from continuing their employment with Forcine, or indeed, to work for any other non-union contractor, in violation of their Section 7 right. (*See* Exception 6.) Thus, the Board should reverse the ALJ's Decision, and hold that the Union's posting of the YouTube Video violated Section 8(b)(1)(A) of the Act.

C. The ALJ Erred In Holding That Local 2012 Did Not Violate Section 8(b)(1)(A) Of The Act By Linking The YouTube Video To Its Facebook Page

For the same reasons set forth in Section IV.B, above, the Board should hold that Local 2012 violated Section 8(b)(1)(A) of the Act by linking the Union's YouTube Video to its Facebook page on the Internet, and reverse the ALJ's Decision. (*See* Exceptions 5 & 6.)

D. The Board Should Issue A Broad Order Against The Union, Which Has Engaged In The Same Types Of Egregious Conduct Toward Employees Of Other Non-Union Employers, At Other Locations, Before And After The Events Involving Forcine's Employees

Finally, Forcine requests the Board should issue a broad order against the Union's and Local 2012's egregious and repeated union coercion of masquerading as government officials at non-union job sites and "cyber-bullying" to prevent similar violations against other employees. A broad cease-and-desist order is appropriate when the respondent "is shown to have a proclivity to violate the Act or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights." *Hickmott Foods*, 242 NLRB 1357, 1357 (1979).

The Board looks to "the totality of circumstances to ascertain whether the respondent's specific unlawful conduct manifests an attitude of opposition to the purposes of the Act to protect the rights of employees generally, which would provide an objective basis for enjoining a reasonably anticipated future threat to any of those Section 7 rights." *Five Star Manufacturing, Inc.*, 348 NLRB 1301, 1302 (2006); *NLRB v. Int'l Brotherhood of Elec. Workers, Local Union* 98, 317 Fed. Appx. 269 (3d Cir. 2006) (upholding broad order against union that obstructed employee's work, given union's history of misconduct several years earlier). Standing alone, Respondents' blatant abuse, threats and intimidation of Forcine's employees and other employees is sufficiently egregious to demonstrate their disregard for employees' Section 7 rights. However, they did not stop with Forcine.

The Union admittedly has engaged in this same outrageous and unlawful conduct against employees of other non-union employers, both before and after the events involving Forcine's employees. Burns testified that, after the June 4, 2010 interrogation of Forcine's employees, he visited other construction sites and interrogated other employees of non-union companies,

including "a job right next door, the Brandelini (ph) Project," using the same tactics. (Tr. at 31, ll.17-25; 32, ll. 1-16.) Burns also testified that other Union agents, including Dyken, had conducted similar visits at other construction sites, and that he had seen videos of such visits, possibly including a YouTube video involving Pulte Homes. (Tr. at 32, ll. 3-9; 38, ll. 4-12; 39, ll. 11-14.) Further, the Union stipulated in this case that:

On many other occasions, MRC agents visited job sites of other non-union employers, during which agents questioned employees about their immigration status and/or other matters, such as whether they were employed as employees or as independent contractors. In at least one other occasion involving MRC's questions to employees about their immigration status and whether they were independent contractors, MRC videotaped that site visit and posted an edited videotape on the internet via YouTube.

 $(Ex. J-1, \P 25.)$

Indeed, the Union has a history of coercion, discrimination and intimidation against non-union employees, and the Board has previously issued broad remedial orders against the Union due to the egregious nature of the conduct and likelihood of recidivism. *Metropolitan Regional Council of Phila. and Vicinity (R.M. Shoemaker Co.)*, 2000 WL 33664352 (NLRB Div. of Judges Jul 18, 2000) (issuing broad order); *Moore-Duncan v. Metropolitan Regional Council of Phila. and Vicinity*, 225 F.3d 649 (3d Cir. 2000) (affirming injunction barring MRC from broadcasting protest messages in residential area at excessively high noise levels); *Metropolitan Regional Council of Phila. and Vicinity, United Brotherhood of Joiners and Carpenters of America, AFL-CIO*, 335 NLRB 814 (2001) (issuing broad remedial order), *enf'd*, 50 Fed. Appx. 88 (3d Cir. 2002).

We are not talking about an unknowing or unsophisticated union -- far from it.

Respondents will continue coercing non-union employees, and perpetuate their misconduct by broadcasting it on the Internet, absent a broad remedial order. The time is ripe for the Board to

take a stand against the Union's and Local 2012's egregious, repeated and widespread coercive tactics, including masquerading as law enforcement officials and "cyber-bullying," and issue a broad order to prevent further violations against other employees.

V. CONCLUSION

For the foregoing reasons, the Board should reverse the ALJ's Decision, and hold that the Respondents, Metropolitan Regional Council of Carpenters, Southeastern Pennsylvania, State of Delaware and Eastern Shore of Maryland, and its affiliated local, Carpenters Union Local 2012, violated Section 8(b)(1)(A) of the Act by restraining and coercing Forcine's employees from exercising their Section 7 rights to refrain from engaging in protected activity, and order all appropriate relief, including removal of the videos from *YouTube* and *Facebook* and Board Notice postings on these sites. Additionally, Forcine requests that the Board issue a broad remedial order against Respondents to prevent future acts of coercion through masquerading as law enforcement officials and "cyber-bulling" against other employees.

Respectfully submitted,

COHEN SEGLIAS PALLAS GREENHALL

& FURMAN, PC

Marc Furman, Esquire

Email: mfurman@cohenseglias.com

Melissa C. Angeline, Esquire

Email: mangeline@cohenseglias.com

30 South 17th Street, 19th Floor

Philadelphia, PA 19103

(215) 564-1700

(215) 564-3066 (fax)

Attorneys for Charging Party,

Forcine Concrete & Construction Co., Inc.

Dated: June 15, 2011

CERTIFICATE OF SERVICE

I, Melissa Angeline, Esquire, hereby certify that on this 15th day of June, 2011, a true and correct copy of the foregoing Brief in Support of Charging Party's Exceptions to Administrative Law Judge Decision was filed electronically with the National Labor Relations Board, and was served via e-mail upon the following:

Edward J. Bonett, Jr., Esquire Counsel for the Acting General Counsel National Labor Relations Board – Region 4 615 Chestnut Street, 7th Floor Philadelphia, PA 19106 edward.bonett@nlrb.gov

Dorothy Moore-Duncan Regional Director National Labor Relations Board – Region 4 615 Chestnut Street, 7th Floor Philadelphia, PA 19106 dorothy.moore-duncan@nlrb.gov

Stephen J. Holroyd, Esquire Marc L. Gelman, Esquire Jennings Sigmond, P.C. Penn Mutual Towers, 16th Floor 510 Walnut Street Philadelphia, PA 19106 sholroyd@jslex.com

MELISŚA C. ANGĒLĪNĒ, ĘSQUIRE